Supreme Court, U. S.
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80-590

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether the Courts of the State of Texas have subject matter jurisdiction to hear causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979)?

2.

Whether the rule of law regarding instructions to the jury that any award of damages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt,* 48 U.S.L.W. 4132 (Feb. 19, 1980), is applicable and controlling in an action arising under the Outer Continental Shelf Lands Act?

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition;

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L. A. Levy, Inc.
   Offshore Crews, Inc.
   Unknown underwriters at interest with the Levy entities, which assumed Respondent's defense.
2. Steven Gaedecke, Plaintiff.
3. Jamail & Kolius, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.
6. Underwriters subscribing Policy No. J.F.X. 0007, issued to Ensearch Corp. and Pool Offshore Company.

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A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas entered in the above-entitled case on December 12, 1979.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 594 S.W.2d 496 and is printed in Appendix A to this

Petition, *infra*, p. A-1. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in Appendix A, *infra*, p. A-20. The judgment of the District Court of Harris County is printed in Appendix A, *infra*, p. A-22.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on December 12, 1979. A timely Motion for Rehearing was filed on December 27, 1979, and overruled on January 9, 1980. Application to the Supreme Court of Texas for Writ of Error, filed February 8, 1980, was refused without opinion with the notation "no reversible error" on June 18, 1980. Timely Motion for Rehearing, filed July 3, 1980, was overruled on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). [The opinion of the Court of Civil Appeals [illegible]eals in pertinent part with federally created rights under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979).]

STATUTE INVOLVED

Section 1333 of Title 43 of the United States Code, as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon.

Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

> (b) The United States district courts shall have original jurisdiction of cases and controversies aris-

ing out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the Outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose.

Subsection (a) provided that:

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Sheif and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, *to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction* located within a State: Provided, however, that mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter. (Emphasis supplied).

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf, and the President shall determine and publish in

the Federal Register such projected lines extending seaward and defining each such area. *All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.* State taxation laws shall not apply to the Outer Continental Shelf. (Emphasis supplied).

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in *or jurisdiction* on behalf of any State *for any purpose* over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (Emphasis supplied).

STATEMENT OF THE CASE

This is an oil company (Respondent Mobil)/drilling contractor (Petitioner Gulf Offshore) contractual indemnity case arising in the area governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979). Respondent's action for contractual indemnity against Petitioner was brought as a third party action in a suit by a personal injury plaintiff, Gaedecke, against Respondent, which action also arose in the area governed by the Lands Act.

On July 9, 1974, Petitioner and Respondent entered into Contract No. 1159, which concerned oil well completion operations to be performed by Petitioner on Respondent's platform wells situated in Grand Isle Block 95 offshore of the State of Louisiana on the Outer Continental Shelf.

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula in the Gulf of Mexico and regained strength, necessitating evacuation of offshore oil platforms

in the Gulf, including the platform upon which Petitioner was performing its completion work for Respondent.

Personal injury plaintiff Gaedecke was injured on September 22, 1975, following his evacuation from the platform to a work boat.

Plaintiff Gaedecke sued Respondent and three additional companies associated with the work boat, L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. for personal injuries sustained as a result of the accident. Respondent filed a Third Party Complaint against Petitioner, alleging liability for indemnity on both tort and contract theories.

Prior to trial, Plaintiff Gaedecke settled with Respondent and the Levy defendants, which had assumed Respondent's defense. Plaintiff proceeded solely against Respondent which, in turn, sought *contractual* indemnity from Petitioner.

Trial was to a jury, which found that Respondent Mobil, by its negligence as offshore platform owner, proximately caused the injuries to Plaintiff. Damages of $900,000.00 were found. The jury also found that Plaintiff's injuries were incident to or resulted directly or indirectly from the work of Petitioner under its contract with Respondent. Judgment for $900,000.00 was rendered in favor of Plaintiff against Respondent, out of which the Intervenor was awarded recovery of the sum of $32,712.09, its workers' compensation lien. Judgment for contractual indemnity in the amount of $900,000.00 was rendered against Petitioner.

Petitioner first raised the federal question pertaining to subject matter jurisdiction sought to be reviewed herein by its First Amended Answer to Respondent's Third

Party Complaint. (Tr. 38-42) and printed in Appendix B, *infra*, p. B-1. Petitioner objected to the Court's lack of subject matter jurisdiction in such Answer and again raised the point by Motion for Summary Judgment prior to trial. (Tr. 123-125). The point was renewed in Petitioner's Motion for Instructed Verdict (Tr. 205-211), in Petitioner's Motion for Judgment Non Obstante Veredicto (Tr. 213-216), in Petitioner's Amended Motion for New Trial (Tr. 276-282) and as Petitioner's first point on appeal to the Court of Civil Appeals and to the Supreme Court of Texas.

The Motion for Summary Judgment, Motion for Instructed Verdict, Motion for Judgment Non Obstante Veredicto and Amended Motion for New Trial were all overruled by the Trial Court. The Court of Civil Appeals affirmed the Trial Court's judgment, holding that the the Courts of the State of Texas have subject matter jurisdiction. The Supreme Court of Texas denied Petitioner's Application for Writ of Error.

Petitioner raised the federal question regarding appropriate instruction to the jury on the issue of taxation of any damage award by requesting that an instruction be given to the jury on the issue. Instruction C was requested in a timely and appropriate fashion prior to finalization of the jury charge but was refused by the Trial Court. (Tr. 198-199, 200-204) and printed in Appendix B, *infra*, p. B-7. Denial of the requested instruction was set forth as a reason for granting a new trial in Petitioner's Amended Motion for New Trial (Tr. 281), but such Motion was overruled. The point was preserved in the appeal to the Court of Civil Appeals as Point of Error 13. The Court of Civil Appeals affirmed the Trial Court on the point. The issue was carried forward as the Twelfth

Point of Error in Petitioner's Application for Writ of Error to the Supreme Court of Texas, but the Application was denied.

REASONS FOR GRANTING THE WRIT

There are two compelling reasons why a review on Writ of Certiorari should be granted in this case:

1. The decision of the Court of Civil Appeals below concerns an extremely important question affecting the jurisdiction of the Federal Courts, is in conflict with another State Court of last resort and is in conflict with decisions of several Federal District Courts.
2. The decision of the Court of Civil Appeals below with respect to the requested jury instruction is in direct conflict with a decision of the Supreme Court of the United States.

I.

IMPORTANT JURISDICTIONAL QUESTION

This Petition presents an important jurisdictional question in regard to the increasing litigation arising out of offshore energy development. Petitioner's position is that the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979) clearly vests subject matter jurisdiction over cases arising under the Act *exclusively* in the Federal Courts.

At virtually every stage of the proceedings in the Trial Court, including pre-trial, trial and post trial, Petitioner objected to the State Court's lack of subject matter jurisdiction. This fundamental error was emphasized on appeal, but the Court of Civil Appeals, and, implicitly, the

Supreme Court of Texas, held that the Lands Act neither intended nor required exclusive jurisdiction in the Federal Courts, becoming the only Courts having considered the question to so hold.

Since one of the Federal District Courts considering the jurisdiction issue and holding in favor of exclusive federal jurisdiction is the United States District Court for the Southern District of Texas, the decision of the Court of Civil Appeals has created a situation ripe for forum shopping and which greatly complicates the question of Federal Court jurisdiction upon removal of cases from State District Courts. By refusing the lead of the Federal District Courts on this important question of interpretation with respect to a federal statute (a reverse *Erie* situation), the Court of Civil Appeals has left the law on the question of subject matter jurisdiction in cases arising under the Lands Act confused and in conflict.

Because of this situation and in view of the increasing litigation arising out of offshore energy development on the Outer Continental Shelf, the issue of subject matter jurisdiction is of greatest importance, and this Court has an obligation to address the question and, hopefully, resolve the conflict.

Additionally, the decision of the Court of Civil Appeals is in direct conflict with the decision of the court of last resort in Louisiana in *Gravois v. Travelers Indemnity Company*, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301). The *Gravois* court held that Federal Courts have exclusive jurisdiction with respect to personal injury and death actions arising as a result of activities on fixed platforms on the Outer Continental Shelf.

Finally, the decision of the Court of Civil Appeals is in direct conflict with a number of Federal District Court cases holding that subject matter jurisdiction is exclusively federal in cases arising under the Lands Act. *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), *Borne v. Tenneco Oil Company*, 1973 A.M.C. 388 (E.D. La. 1972) and *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979).

The applicability of the Lands Act to plaintiff's personal injury action against Respondent and its contractual indemnity action against Petitioner was recognized by the Court of Civil Appeals, which also acknowledged that the Lands Act establishes the structure of remedies for fixed platform workers on the Outer Continental Shelf and substantively controls other disputes arising in the area governed by the Act, such as the subject contractual indemnity action. Consequently, the focus of Petitioner's disagreement with the Court of Civil Appeals is on the question of *exclusivity* of Federal Court subject matter jurisdiction over the remedies of workers such as the plaintiff and suits such as the contractual action brought by Respondent.

Although interpreting case law and secondary source material clearly reflect the exclusivity of Federal Court jurisdiction over matters pertaining to fixed platforms on the Outer Continental Shelf in the Gulf of Mexico, it is actually unnecessary to go further than the wording of the statute itself to find conclusively that the State Courts are without subject matter jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf. The opinion of the Court of Civil Appeals hinged on the

absence of the word "exclusive" in the statute's jurisdictional section, but exclusivity may also be established by fair implication and a reading of the statute as a whole leads inevitably to the conclusion that Congress intended federal sovereignty, federal policy, and federal law in the Lands Act area to be judicially governed exclusively by the Federal Courts.

Plaintiff's accident occurred on September 22, 1975, and suit was originally filed on November 20, 1975 (Tr. 2). The indemnity action was filed by Respondent on February 10, 1977 (Tr. 16). Thus, the statutory references pertinent to this question would be the provisions of the Lands Act as they appeared at those material times. The Lands Act was amended on September 18, 1978, but absolutely no change material to the question of the exclusivity of subject matter jurisdiction in the Federal Courts was effected. The Court of Civil Appeals' opinion noted that the word "original" was omitted from the statute's jurisdictional section by the 1978 amendments and attached significance to this omission. The absence of the word "original" from the current text lends no support to Respondent's position regarding exclusivity because a grant of "jurisdiction" is indistinguishable from one of "original jurisdiction" insofar as the Federal Trial Courts are concerned. To the contrary, in view of the fact that Congress was chargeable with knowledge of the pre-1978 case law holding subject matter jurisdiction exclusively in the Federal Courts, the failure of the 1978 amendments to the Lands Act to set forth a clear grant of concurrent jurisdiction, changing the existing law, militates in favor of Petitioner's position.

Section 1333 of Title 43 of the United States Code as it appeared at all times pertinent to this litigation,

had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon. Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

> "(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and sea bed of the Outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose."

Subsection (a) (1) provided that:

> "(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and sea bed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent *as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State:* Provided, however, that mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter." (Emphasis supplied).

Subsection (a)(2) declared, and as amended still declares, the civil and criminal laws of the adjacent states

to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon to the extent that they are applicable and not inconsistent with federal law and regulations.

The next to the last sentence of that subsection is particularly enlightening, as it provided, and still provides that:

> "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States."

If further indicia of the exclusivity of federal jurisdiction over cases and controversies arising out of or in connection with operations conducted on the Outer Continental Shelf is required, subsection (a)(3) of Section 1333 should resolve any doubts. That subsection provided, and continues to provide that:

> "(a)(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the sea bed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom."

Finally, the policy of the United States with respect to its exercise of jurisdiction over the subsoil and seabed of the Outer Continental Shelf is clearly set forth in 43 U.S.C. § 1332 (Supp. 1979), and this, in conjunction with the other expressions of exclusive federal jurisdiction found in the Act, works to clearly preclude State Court jurisdiction over such matters by fair implication.

As indicated above, the interpreting case law and secondary source material are uniformly supportive of the exclusivity of federal jurisdiction with respect to cases such as the one at bar. In an annotation found at 30 A.L.R. Fed. 535 (1976) concerning "Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. § 1333), Relating to Laws Applicable to the Subsoil and Sea Bed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon," the author states unequivocally in the summary and comment section (§ 2) that:

> "The Constitution and laws of the United States are made applicable to the Outer Continental Shelf (43 U.S.C.A. § 1333(a)(1)), and it has been held that federal law applies exclusively to these submerged lands . . . and that insofar as the Act gives United States District Courts 'original jurisdiction' over cases and controversies arising in connection with operations conducted on the Outer Continental Shelf (43 U.S.C.A. § 1333(b)), *such jurisdiction is exclusive, State Courts having no jurisdiction of the subject matter . . .*" (Emphasis supplied).

Discussed at length in the annotation is the case of *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F. Supp. 757 (E.D. La. 1972), which involved a suit arising out of a contract in which the plaintiff agreed to furnish certain equipment to the defendant for use in raising an oil drilling platform which had sunk to the floor of the Outer Continental Shelf as the result of hurricane damage. The action had originally been brought in a Louisiana State Court, but had been removed to Federal District Court by the defendant, where consideration was given to the plaintiff's motion to remand the case. District Judge

Alvin B. Rubin, a noted authority on admiralty and maritime matters and the rights of offshore oil workers, who has since been appointed to the Fifth Circuit Court of Appeals, analyzed the provisions of the Lands Act in great detail and held that exclusive jurisdiction over the subject matter of the action was vested in the United States District Court by the Act.

A subsequent case provides further support. In *Borne v. Tenneco Oil Company,* 1973 A.M.C. 388, 389 (E.D. La. 1972), it was held that the Lands Act "confers *exclusive* jurisdiction on the U. S. District Courts 'of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf . . .'" (Emphasis supplied).

Judge Ross N. Sterling of the United States District Court for the Southern District of Texas, Houston Division, has recently had occasion to consider the question of the exclusivity of Federal Court jurisdiction over claims arising out of accidents on fixed oil field platforms in the area governed by the Lands Act and has held that the Federal Courts have exclusive subject matter jurisdiction. *Friedrich v. Whittaker Corporation,* 467 F. Supp. 1012 (S.D. Tex. 1979).

Finally, although the precise question presented herein was not at issue, the decision of this Court in *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969) clearly reflects in its consideration of the history of the passage of the Lands Act that the intention of the Act was that it vest exclusive jurisdiction in the Federal Courts. Discussing the hearings held before the Senate Committee on Interior and Insular Affairs with respect to the applicability of maritime law to injuries occurring

on fixed structures on the Outer Continental Shelf, the Court noted as follows:

> "On the other hand, Federal enforcement of the law in this area was insisted upon by the Department of Justice, and there was substantial doubt whether State law and jurisdiction could or should be extended to these structures. A Federal solution was thought necessary." 395 U.S. 352, 364.

With respect to the compromise which emerged, the Court had these observations:

> "The administration's opposition to committing these areas solely to the jurisdiction of State Courts, state substantive law, and state law enforcement was recognized in that *the applicable law was made Federal law enforceable by Federal officials in Federal Courts.* But the special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families was also recognized by dropping the treatment of these structures as 'vessels' and instead, over the objections of the administration that these islands were not really located within a State, the bill was amended to treat them 'as if [they] were [in] an area of exclusive Federal jurisdiction located within a State.' *State law became Federal law federally enforced.*" 395 U.S. 352, 365. (Emphasis supplied).

Respondent's contractual indemnity action against Petitioner was dependent upon a finding of liability against Respondent with respect to the plaintiff's action. No such judgment rendered by the Trial Court could be valid as it lacked subject matter jurisdiction and, consequentiy, there was no predicate for the judgment of indemnity against Petitioner. Additionally, the third party action of

Respondent was, itself, dependent upon the Lands Act and, consequently, the Trial Court was similarly without subject matter jurisdiction over that action. Again, no valid judgment of indemnity could be rendered.

The absence of subject matter jurisdiction over plaintiff's personal injury case against Respondent and its contractual indemnity case against Petitioner constitutes fundamental error. The Trial Court should not have retained jurisdiction and it had no power to render the judgment of contractual indemnity in favor of Respondent. Both the Court of Civil Appeals and Supreme Court of Texas should have dismissed the case for want of jurisdiction and had no power to affirm the judgment. A Court that is without subject matter jurisdiction has no authority to render any judgment other than one of dismissal. *Southwestern Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976); *City of Beaumont v. West*, 484 S.W.2d 789 (Tex. Civ. App.—Beaumont 1972, writ ref. n.r.e.); and *Barnes v. Bituminous Casualty Corp.*, 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref. n.r.e.).

II.

CONFLICT WITH THE UNITED STATES SUPREME COURT

The Court of Civil Appeals held that the Trial Court committed no error in denying Petitioner's requested jury Instruction C, designed to make the jury aware that any award of damages would not be subject to federal income taxation. This decision is in direct conflict with this Court's holding in *Norfolk & Western Railway Company v. Liepelt*, 48 U.S.L.W. 4132 (Feb. 19, 1980). In *Liepelt*, this Court held that it was reversible error for the Trial

Court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested a similar, brief and easily understood instruction, which was refused.[1]

There is no question that Petitioner's requested Instruction C was submitted to the Trial Court for inclusion in the jury charge in a timely and appropriate fashion, but was refused (Tr. 198-199, 200-204). The Transcript reflects that all three requested instructions, A, B and C, were refused. The three instructions were stapled together in sequential order and the Judge signed the top one, A, to signify his refusal to submit them. The error was preserved by setting forth denial of requested Instruction C as a reason for granting a new trial (Tr. 281), and, of course, the point has been further preserved in the appeal to the Court of Civil Appeals and Application for Writ of Error to the Supreme Court of Texas.

Although the *Liepelt* case addressed the jury instruction issue in the context of a wrongful death action brought under the Federal Employer's Liability Act (FELA), the holding is clearly applicable in this case arising under the Lands Act.

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1. Petitioner's requested Instruction C was as follows:
You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes (Tr. 199), and printed in Appendix B, *infra*, p. B-7.

The Court of Civil Appeals recognized the applicability of the Lands Act to plaintiff's personal injury action against Respondent and its contractual indemnity action against Petitioner. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court held that under the Lands Act the applicable law is federal law with the law of the state adjacent to the fixed platform in question to be utilized only to fill "gaps" in the controlling federal law. Central to the *Liepelt* holding is the established view that questions concerning the measure of damages in actions predicated on federally created rights are federal in character and governed by federal law even when the action is pending in State Court. Consequently, the law of the adjacent state in this case, Louisiana, and additionally, the law of the forum state, Texas, with respect to the requested jury instruction was irrelevant and the Trial Court should have given the requested instruction.

The *Liepelt* decision establishes the existence of federal law and policy on the question of such an instruction so that, under the Lands Act, reference to state law on the question was impermissible. That federal law and policy are expressed generally is clear as there can be no cogent reason for differentiating between such instructions in the context of actions brought under the FELA, the Lands Act, the Jones Act, or any of the other federal acts creating causes of action for personal injury. The evil addressed by this Court is the same in all of these areas and the remedy provided is well suited to all, as well.

Finally, it is also clear that the *Liepelt* rule of law is controlling in this matter even though the decision was handed down after the Trial Court's refusal of the requested instruction. In *Lang v. Texas & P. Ry. Co.*, 624

F.2d 1275 (5th Cir. 1980), the question of retroactive application of the *Liepelt* holding was addressed and the position that it should not be applied retroactively rejected. The Court found that retroactive application of the rule of law established in *Liepelt* would not result in "manifest injustice." A similar result was reached in *Cazad v. Chesapeake & Ohio Ry.*, 622 F.2d 72 (4th Cir. 1980), a case tried prior to *Liepelt*, but pending on appeal when *Liepelt* was decided, in which the Fourth Circuit reversed for failure to give a proffered instruction which was substantially identical to the instruction required in *Liepelt*.

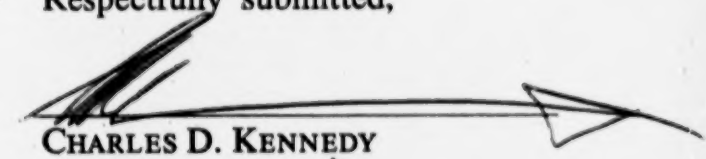
The *Liepelt* decision was brought to the attention of the Supreme Court of Texas by Supplemental Brief, but was evidently ignored. Petitioner's view is that suggestions of "manifest injustice" in applying *Liepelt* at this stage are not well taken. A greater injustice would be done in not applying that holding in light of the fact that Petitioner informed the Trial Court of the appropriate law and requested an appropriate instruction, the giving of which could not possibly have caused any harm. Petitioner is at a loss to explain what more it could have done to protect its rights in this regard.

Under these circumstances, this Court should do simple justice by granting the Petition for Writ of Certiorari and reversing the decision of the Court of Civil Appeals, mandating a new trial.

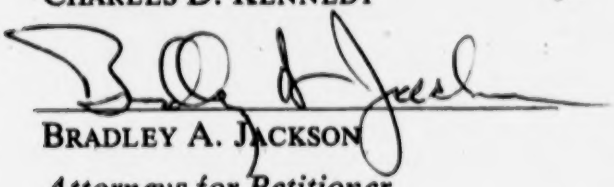
CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



CHARLES D. KENNEDY



BRADLEY A. JACKSON

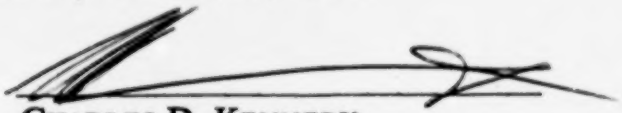
Attorneys for Petitioner

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Suite 3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, *i.e.*, on Respondent by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record as follows, Frank Caton, Esq., Crain, Caton, James and Womble, 3300 Two Houston Center, Houston, Texas 77002, and on the Plaintiff in the Trial Court by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record as follows, Joseph D. Jamail, Esq., Jamail & Kolius. 3300 One Allen Center, Houston, Texas 77002, this 14th day of October, 1980.



CHARLES D. KENNEDY

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

Court of Civil Appeals Opinion

No. B2159

Affirmed, and Opinion filed December 12, 1979.

GULF OFFSHORE COMPANY,
A Division of the Pool Company, Appellant

v.

MOBIL OIL CORPORATION, Appellee

Appeal from 129th District Court of Harris County

Appellant, Gulf Offshore Company, a Division of the Pool Company, appealed from a judgment for indemnity rendered in favor of appellee, Mobil Oil Corporation. Appellant Gulf Offshore was a third party defendant below and appellee Mobil was defendant and third party plaintiff. Steven Gaedecke was plaintiff in the trial court.

Steven Gaedecke, an employee of third party defendant-appellant Gulf Offshore, sued defendant-appellee Mobil, and L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc., for personal injuries sustained on a vessel owned by Levy and chartered by Mobil. Mobil later filed a third party complaint against Gulf Offshore, alleging liability for indemnity pursuant to certain provisions in the contract for well completion operations which was executed by Gulf Offshore as the contractor-indemnitor and Mobil as platform owner-indemnitee.

Prior to trial, plaintiff Gaedecke settled with the Levy defendants for a guaranteed recovery of $100,000.00 and proceeded to take a non-suit against them. Plaintiff also reached agreement with defendant Mobil, that if Mobil did not obtain indemnity from Gulf, plaintiff's recovery against Mobil would be limited to $200,000.00 plus the compensation lien. Also present in the trial court was intervenor, Employers' National Insurance Company.

On September 22, 1975, plaintiff Gaedecke was safely aboard the vessel Salton-Seahorse, having been evacuated pursuant to the implementation of Mobil's hurricane evacuation plan. Defendant Mobil had arranged for the vessel, owned and operated by Levy, to stand by for the evacuation. Following preparation for evacuation, all machinery was shut down, and after evacuation from the platform of all but two platform workers employed by Gulf Offshore by use of the crane, even its generator was shut off. As the last two workers, the crane operator and his helper, attempted to evacuate from the platform using a rope to swing onto the deck of the Salton-Seahorse, plaintiff heard some party yell down to him to go aft and provide assistance. A large wave washed across the aft area of the vessel where he had positioned himself and plaintiff was swept along the deck of the vessel and ended up against a pallet loaded with sand. Plaintiff Gaedecke suffered injuries primarily to his back.

At trial in response to special issues, the jury returned a verdict which found that defendant, Mobil Oil Corporation, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform and in the selection of the method used to evacuate the

crew from the platform; that such were a proximate cause of the plaintiff's injuries; that $900,000.00 would be a sum which would fairly and reasonably compensate plaintiff for injuries suffered; and that plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. The trial court entered judgment based on the jury's answers to the special issues and granted indemnity to Mobil from Gulf Offshore for $900,000.00 less the compensation lien of $32,712.09. Gulf Offshore appeals from the judgment of indemnity.

Defendant Mobil and third party defendant Gulf Offshore entered into contract number 1159, which concerned oil well completion operations to be performed by Gulf Offshore on defendant Mobil's platform wells situated in Grande Isle, Block 95, offshore of the State of Louisiana. Section 15 set out the provisions made concerning insurance and indemnity:

15. INSURANCE AND INDEMNITY:

15.1 At any and all times during the term of this agreement, Contractor agrees to maintain in force and submit evidence of insurance equal to or in excess of the requirements detailed in Exhibit B attached hereto and made a part hereof.

15.2 All insurance shall be carried in a company or companies acceptable to Mobil and shall be maintained in full force and effect during the term of this agreement, and shall not be canceled [sic], altered, or amended without ten (10) days prior written notice having first been furnished Mobil. Upon request Mobil shall be furnished certified copies of all such insurance policies.

15.3 In the event Contractor is a self-insurer and Mobil has consented to Contractor's being a self-

> insurer as to any one or more of the risks as to which coverage is required, evidence of such consent must be in writing and approved by a representative of Mobil authorized to enter into such consent agreement.
>
> 15.4 Contractor shall protect, indemnify and save Mobil Harmless against any and all claims, demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries or death, or damage to property occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees, and whether due to imperfection of any material furnished by Mobil, or the premises themselves or any equipment thereon, whether latent or patent, or for any other cause whatsoever; and for damages for infringement of any patent as more particularly set forth in Paragraph 23 hereof.

Appellant's first point of error addresses the threshold question of the jurisdiction of the courts of the State of Texas to entertain causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979). There is no dispute as to the applicability of the Outer Continental Shelf Lands Act to this case. 43 U.S.C.A. § 1333(a)(1) (1975), in effect at the time of this accident, states that:

> The Constitution and laws of civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached

> to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state.

The section of the Act in effect in this case, 43 U.S. C.A. § 1333(b) (1975), governing jurisdiction specifies that:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

We note that nowhere in this section does the word "exclusive" appear. Appellant argues that the Act vests exclusive jurisdiction of the subject matter of the plaintiff's main cause of action and the indemnity action in federal district court. We do not read 43 U.S.C.A. § 1333 (b) (1975) so as to oust our state courts of subject matter jurisdiction in this case.

No authoritative case law, either state of federal, has resolved the issue of the exclusivity of federal court jurisdiction over actions filed pursuant to the Outer Continental Shelf Lands Act. In *Fluor Ocean Services, Inc. v.*

Rucker Company, 341 F.Supp. 757 (E.D. La. 1972), and *Borne v. Tenneco Oil Company, et al.*, 1973 A.M.C. 388 (E.D. La. 1972), Judge Rubin held that the Act conferred exclusive jurisdiction on the U.S. district courts for causes of action arising out of operations conducted on the outer Continental Shelf and further held in *Fluor* that the intent of Congress was to make such operations subject to the exclusive control and jurisdiction of the federal government. We disagree for the reasons stated in the foregoing paragraph. We also note that in the penultimate paragraph of the opinion in *Fluor*, Judge Rubin merely found that the federal district court had original jurisdiction.

Judge Rubin wrote that as a matter of policy, ". . . in an area where the federal government had exerted exclusive sovereignty, such as the outer Continental Shelf, a single federal forum would be more appropriate than multiple state forums to decide disputes that arise there." *Fluor Ocean Services, Inc. v. Rucker Company, supra* at 760. We do not believe this to be necessarily so. The Act provides that the Constitution and laws of the United States govern the outer Continental Shelf, 43 U.S.C.A. § 1333(a)(1) (1975), and where applicable and not inconsistent with this Act or with federal laws, the laws of the adjacent state are declared to be the law of the United States regarding the outer Continental Shelf. 43 U.S.C.A. § 1333(a)(2) (1975). The end result would be an application of the same laws no matter where the forum was located, whether state of federal.

Following *Fluor* is the recent decision of *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979). Here Judge Sterling recognized that the holding in *Fluor*, which acknowledged that such jurisdiction was

original, did not necessarily include exclusive. Judge Sterling dismissed the case in *Friedrich* on other grounds, noting that a prompt authoritative resolution of the issue of original or exclusive jurisdiction by a federal appellate court would be welcomed. *Friedrich v. Whittaker Corporation, supra* at 1015. Nonetheless, *Friedrich* held that federal courts have exclusive jurisdiction over claims arising out of accidents on fixed oil rigs in areas covered by the Outer Continental Shelf Lands Act. *Id.* at 1014.

One Louisiana decision, *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. Ct. App.), *writ ref'd,* 247 La. 1016, 175 So.2d 301 (1965), has also faced the issue of the exclusivity of federal court jurisdiction under the Outer Continental Shelf Lands Act. The majority opinion, holding for exclusive federal court jurisdiction under the Act, drew a vigorous dissent. We follow the dissent in *Gravois* in two respects by holding that our state courts may take cognizance of an action asserted under this Act irrespective of the fact that the incident giving rise thereto occurred within the federally defined limits of the outer Continental Shelf, and secondly, that our state courts have jurisdiction to adjudicate plaintiff's claims irrespective of which law must be applied in the determination thereof. *Gravois v. Travelers Indemnity Company,* 173 So.2d at 556, 559.

43 U.S.C.A. § 1333(b) (1975) of the Outer Continental Shelf Lands Act was amended and renumbered in 1978 to 43 U.S.C.A. § 1349(b)(1) (1978) and now reads in pertinant part as follows:

> . . . the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation

> conducted on the outer Continental Shelf or which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

The word "original" was omitted in the 1978 version. We find this omission significant in that it further supports our holding that the Act neither intended nor required sole original or exclusive jurisdiction in the federal courts. Point of error one is overruled.

In its second point on appeal, appellant Gulf Offshore contends that its Motion for Judgment Non Obstante Veredicto was improperly overruled because the jury verdict upon which the judgment of indemnity in favor of defendant Mobil was predicated, was the product of fraud and collusion by attorneys for plaintiff and Mobil, and Mobil, therefore, is precluded from obtaining indemnity as a matter of law. A motion for judgment non obstante veredicto is proper ". . . if a directed verdict would have been proper . . ." TEX. R. CIV. P. 301.

In determining whether the trial court erred in refusing to grant a motion for judgment notwithstanding the verdict, the inquiry is whether there is any evidence of probative force to support the verdict of the jury. *City of San Augustine v. Roy W. Green Company,* 548 S.W. 2d 467, 472 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In determining whether there is any evidence of probative force to support the verdict, we are required

to view the evidence in the light most favorable to the party against whom the motion is sought and every reasonable intendment deducible from the evidence is to be indulged in that party's favor. *Id.* at 472.

Based on the record, we fail to see how the jury's verdict in the instant case could be construed to be the product of fraud and collusion between counsel for plaintiff and counsel for Mobil. All parties were represented in trial by highly competent attorneys; all the agreements, the legality of which is uncontested, were disclosed prior to trial in the presence of the trial judge and duly recorded by the court reporter. Counsel for appellant Gulf Offshore was given ample opportunity to question the attorneys for the plaintiff and appellee Mobil at that time.

Attorneys engaged in the trial of cases have heavy responsibilities, and must have latitude in making tactical decisions as how to best represent their clients within the bounds of propriety. *General Motors Corporation v. Hebert,* 501 S.W.2d 950, 957 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). Under these facts, where appellee Mobil was unable to reach agreement with appellant Gulf Offshore on the issue of indemnity, it is understandable that counsel for Mobil would cooperate with counsel for plaintiff to limit Mobil's potential liability in the event Mobil did not obtain indemnity from Gulf Offshore. Point of error two is overruled.

Points of error three, four, five and six complain of the lack of evidence to support the judgment for contractual indemnity given the language in Section 15.4 of the contract. Section 15.4 states in pertinent part:

> Contractor [Gulf Offshore] shall protect, indemnify and save Mobil Harmless against any and all claims,

> demands and causes of action of every kind and character arising in favor of any person, including both Mobil's and Contractor's employees, on account of personal injuries . . . occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, whether such loss, damage, injury or liability arises from or is contributed to by the negligence of Mobil or its employees . . .

Appellant Gulf Offshore contends that the plaintiff's injuries were not incident to or the result of Gulf Offshore's work to be performed under the contract with Mobil.

We find sufficient evidence in the record to support the jury's answer to special issue four which inquired whether or not plaintiff's injuries were incident to, or resulted directly or indirectly from, the work to be performed by Gulf Offshore under its contract with Mobil. Plaintiff's own testimony that it was the normal thing to do to assist the last two Gulf Offshore employees off the platform even though an evacuation was in progress and that it was customary to help other Gulf Offshore employees in the regular course of their work was uncontroverted. The evidence elicited regarding the work operations on the platform justifies the jury's answer that the injuries suffered by the plaintiff were incident to, or resulting directly or indirectly from the work required. These points of error are overruled.

In points of error seven, eight and nine, appellant Gulf Offshore contends that Louisiana law, applied as controlling federal law in this case, and Texas law prohibit contractual indemnity between an oil company and a contractor unless there is insurance coverage or alternatively, that any liability for indemnity should be limited

to the amount of insurance required by the contract. Furthermore, appellant by relying on TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) urges that the public policy of the State of Texas prohibits contractual indemnity unless covered by insurance and then only to a maximum ceiling of $300,000.00.

43 U.S.C.A. § 1333 (a)(2) (1975), in effect at the time of this accident, states that:

> To the extent that they are applicable and not inconsistent with the subchapter [Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331-1356 (1979)] or with other federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States . . .

It is clear to this court that federal law, and decisions interpreting those laws, apply in this instance, and where there are no such laws or decisions, this court shall apply the laws and decisions of the State of Louisiana. The Outer Continental Shelf Lands Act makes it clear that federal law, supplemented by state law of the adjacent state, when not inconsistent with applicable federal law,

is to be applied to drilling rigs as artificial islands as though they were federal enclaves in an upland state. *Rodrique v. Aetna Casualty and Surety Company*, 395 U.S. 353, 355 (1969). It is evident that federal law is exclusive in its regulation of this area, and that state law is adopted only as surrogate federal law. *Id.* at 357.

In *Day v. Ocean Drilling and Exploration Company*, 353 F. Supp. 1350 (E.D. La. 1973), a motion for summary judgment was presented to the federal district court regarding interpretation of a contract containing an indemnity agreement similar to the one in our case. The contract before that court provided minimum limits of $300,000.00 for insurance coverage of contractual liabilities and indemnities assumed by the contractor covering all claims "incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents . . . or in connection with the work to be performed, services to be rendered, or materials to be furnished, under this contract . . ." *Id.* at 1351.

Plaintiff Day was working on a fixed platform located on the outer Continental Shelf. As he passed by a compressor, it suddenly exploded, injuring him.

Louisiana law was applied in *Day* as surrogate federal law to interpret the contract. The court held that while Louisiana courts have read such an indemnity agreement narrowly, the agreement must be given effect according to the intention of the parties. *Id.* at 1352. Judge Rubin did not limit his interpretation to any one of the phrases in the indemnity agreement, e.g. "arising out of" and "in connection with." Instead, taking the contract as a whole, the court held that it was the intention of the parties to require indemnity against all risks of harm with insurance

coverage and that such an indemnity agreement would be upheld.

We disagree with respect to the position taken by appellant Gulf Offshore that indemnity agreements are not enforceable under Louisiana law without insurance coverage. This issue was not reached in *Day* as insurance coverage was undisputedly provided pursuant to the contract in that case. In the two cases cited by appellant, *Dickerson v. Continental Oil Company,* 449 F.2d 1209 (5th Cir. 1971), and *Hicks v. Ocean Drilling and Exploration Company,* 512 F.2d 817 (5th Cir. 1975), the limits of liability for the indemnitors in both cases were limited to the amounts of insurance coverage provided in the respective contracts. Unlike the facts before us, in neither case was there any dispute as to the limits of liability contracted for or that insurance coverage was in fact obtained.

The record in this case does not reflect any proof as to the existence of insurance obtained to protect against the risks assumed by appellant Gulf Offshore or any limits of liability agreed to by the parties in their contract. During the trial, appellee Mobil tendered into evidence certain documents identified as the contract executed by appellant Gulf Offshore and appellee Mobil, without any objections from appellant Gulf Offshore.

Later, appellant Gulf Offshore discovered an Exhibit B was unattached to the contract admitted into evidence. In a post-trial proceeding, appellant sought to have the exhibit made a part of the record. The unattached exhibit allegedly stated what the limits of liability were. Having made no objection to the offer of the contract at trial, appellant has waived any complaint concerning the ex-

clusion of the exhibit. The trial court in the post-trial proceeding properly excluded the exhibit from the record since it was evidence on a controversial matter. *State v. Harrington,* 407 S.W.2d 467 (Tex. 1966), *cert. den.,* 386 U.S. 944 (1967); TEX. R. CIV. P. 270. For these reasons, we overrule as well appellant's alternative assertion that its liability for contractual indemnity should be limited to $100,000.00, that being the limit of liability allegedly required by the contract.

TEX. REV. CIV. STAT. ANN. art. 2212b (Vernon Supp. 1978-1979) declares indemnity provisions in agreements pertaining to wells for oil, gas, or water, or mines for other minerals, where there is negligence attributable to the indemnitee, void and unenforceable as against the public policy of the State of Texas, except if the parties agree in writing, that such indemnity obligation will be supported by liability insurance furnished by indemnitor, and then only to the limits of insurance agreed to be furnished.

We hold that this provision has no application to the instant case. Applying federal law pursuant to the Outer Continental Shelf Lands Act and Louisiana law as surrogate federal law, where not inconsistent with federal law, the indemnity agreement in this case does not fail as against the public policy of the State of Louisiana irrespective of the existence or non-existence of insurance. *Hicks v. Ocean Drilling and Exploration Company,* 512 F.2d at 826; *Dickerson v. Continental Oil Company,* 449 F.2d at 1221. Following Justice Guittard in *Mamlin v. Susan Thomas, Incorporated,* 490 S.W.2d 634, 636-37 (Tex. Civ. App.—Dallas 1973, no writ), we hold that the Texas concept of public policy cannot prevail against the national policy enunciated in a federal act as declared

by Congress in matters within its power. Points of error seven, eight and nine are overruled.

Appellant Gulf Offshore next urges error in the alignment of parties prior to the assignment of peremptory challenges and in the failure to equalize the challenges among the parties, thereby depriving appellant of a fair trial. Plaintiff Gaedecke was awarded twelve peremptory challenges and appellant Gulf Offshore and appellee Mobil were each awarded six peremptory challenges.

The granting of peremptory challenges depends on whether the interests of the parties within the meaning of TEX. R. CIV. P. 233 are, at least in part, antagonistic in a matter that the jury is to be concerned with. *Perkins v. Freeman,* 518 S.W.2d 532 (Tex. 1974). TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979) requires the trial court, after alignment of the parties, to equalize the number of peremptory challenges.

The record on appeal consists of a partial statement of facts, the jury voir dire having been omitted. Antagonism between plaintiff and appellee Mobil was shown by the pleadings and none of the pre-trial concessions changed that. The record does not reflect in any manner how appellant was injured by the jury selection process.

Appellant assigns as error the refusal of four requested special issues which inquire about appellee Mobil's negligence as vessel-charterer of the Salton-Seahorse. Appellant contends that favorable answers to these special issues could have established the negligence of Mobil as vessel-charterer being the sole cause of plaintiff's injuries, thereby precluding contractual indemnity against appellant Gulf Offshore. 33 U.S.C.A. § 905 (b) (1978) precludes liability of an employer by agreement directly or in-

directly for injuries to an employee caused by the negligence of a vessel.

We do not find any evidence in the record nor do the pleadings reveal that the issue of sole cause was raised. TEX. R. CIV. P. 279 requires that when a case is submitted upon special issues, only those controlling issues made by the written pleadings and the evidence shall be submitted. There was evidence from which the jury could have found appellee Mobil negligent as a fixed platform operator or as a vessel-charterer. Given the jury's answers to the special issue actually submitted, finding Mobil negligent in the capacity as fixed platform operator, the result would not have changed. We find no error in the refusal to submit the requested issues.

In its last three points of error, appellant attacks the refusal to submit tendered instructions prohibiting consideration by the jury of inflationary trends or increases in productivity as factors affecting awards for future wage loss, the inapplicability of federal income taxes and the reduction of any future damage award to present value by the use of an appropriate interest rate prevailing at time of trial.

The trial court properly refused to permit the jury from considering evidence as to inflationary trends as an element of damages for future wage loss. *Davis v. Hill Engineering Company,* 549 F.2d 314 (5th Cir. 1977); *Johnson v. Penrod Drilling Company,* 510 F.2d 234 (5th Cir.) (en banc), *cert. den.,* 423 U.S. 839 (1975). Increases in productivity were not proper for consideration by the jury. *Davis v. Hill Engineering Company,* 549 F.2d at 335. *Davis, Johnson,* and another case cited by appellant, *Blue v. Western Railway of Alabama,* 469 F.2d 487 (5th Cir. 1972), *cert. den.,* 410 U.S. 956

(1973), do not hold that appellant would be entitled to an affirmative instruction prohibiting the jury's consideration of these factors. Furthermore, the record before us gives no indication that the jury in fact considered inflationary trends or increases in productivity in calculating the damages award.

Johnson v. Penrod Drilling Company, 510 F.2d at 236-37, specifically prohibits consideration by the jury by evidence or instruction, of the impact of income taxes in the calculation of a proper award for loss of future wages.

Davis, Johnson and *Blue* permit a trial court to admit evidence pertaining to the reduction of the award for future damages, to present value by the use of an appropriate interest rate prevailing at the time and place of trial. We hold that this was adequately provided for in the damage issue which was actually submitted and which inquired: "What sum of money, if any, if paid now cash . . . ." would reasonably compensate plaintiff Gaedecke. *Davis, Johnson,* and *Blue* do not hold that appellant would be entitled to an instruction solely directing the jury to apply an appropriate interest rate to reduce to present value any sum awarded for future damages. Points of error twelve, thirteen and fourteen are overruled.

Having carefully reviewed all the points of error and the authorities cited in the briefs, we accordingly affirm the judgment of the trial court.

/s/ Felix Salazar, Jr.
Justice

Judgment rendered, and Opinion filed December 12, 1979.

Panel consists of Associate Justices Coulson, Salazar and Junell.

Court of Civil Appeals

JUDGMENT

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY
VS. NO. B2159
MOBIL OIL CORPORATION, ET AL

"This cause, being an appeal from the judgment rendered by the court below and entered on December 28, 1978, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellant, Gulf Offshore Company, a division of the Pool Company, and its surety, Western Surety Company, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

COURT OF CIVIL APPEALS
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

January 9, 1980

Hon. Charles D. Kennedy
Hon. Bradley A. Jackson
Royston, Rayzor, Vickery & Williams
Suite 3710
One Shell Plaza
Houston, Texas 77002

Hon. Frank Caton
Hon. Gary L. Marks
Crain, Caton, James & Oberwetter
3300 Two Houston Center
Houston, Texas 77002

Hon. Joseph D. Jamail
Hon. Gus Kolius
Hon. John B. Neibel
Hon. Nat B. King
Jamail & Kolius
3300 One Allen Center
Smith at Dallas Streets
Houston, Texas 77002

Re: B2159—Gulf Offshore Company, a division of the Pool Company v. Mobil Corporation, et al, from Harris

Gentlemen:

Please be advised that on this date in the above cause the Court OVERRULED appellant's motion for rehearing.

Also, please be advised that application for writ of error, if any, must be submitted on or before Friday, February 8, 1980.

Respectfully,

/s/ THELMA MUELLER
Thelma Mueller, Clerk

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

June 18, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9169, GULF OFFSHORE CO., A DIVISION OF THE POOL COMPANY v. MOBIL OIL CORPORATION ET AL was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

July 16, 1980

Dear Sir:

You are herby notified that the Motion for Rehearing in the case of B-9169, Gulf Offshore Company

v.

Mobil Oil Corp et al.

was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON, Clerk

JUDGMENT ENTERED: Volume 1655, Page 767, General Minutes District Courts, in and for Harris County, Texas.

NO. 1,052,262

In The
DISTRICT COURT OF HARRIS COUNTY, TEXAS
129th Judicial District

STEVEN GAEDECKE

v.

MOBIL OIL CORPORATION, ET AL

v.

GULF OFFSHORE CO.,
A Division of the Pool Company

JUDGMENT

BE IT REMEMBERED that on the 20th day of November, 1978, came on to be heard the above styled and numbered cause, wherein Steven Gaedecke is Plaintiff, Mobil Oil Corporation, Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. are Defendants, and Mobil Oil Corporation is Third-Party Plaintiff, and Gulf Offshore Co., A Division of the Pool Company is Third-Party Defendant, and Employers' National Insurance Company is Intervenor, and came the parties Plaintiff, Defendants, Third-Party Plaintiff, Third-Party Defendant and Intervenor, and announced ready for trial. Prior to the voir dire examination of the jury panel, Plaintiff, in open court, took a voluntary non-suit as to Defendants Arthur Levy Boat Company, Arthur Levy, Inc.,

and Offshore Crews, Inc., and the Court having noted said Non-Suit did by its Order dismiss the Defendants Arthur Levy Boat Company, Arthur Levy, Inc., and Offshore Crews, Inc. only. And came the jury consisting of twelve good and lawful men and women consisting of Catherine Mary Byrnes and eleven others who being duly empaneled and sworn and having heard the pleadings, evidence, stipulations and arguments of counsel, did on the 22nd day of November, 1978, return in open court their verdict as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Mobil Oil Corporation, at the time in question and under the circumstances existing, failed to exercise that degree of care that should have been exercised by a reasonably prudent offshore platform operator in one or both of the following:

1. In waiting until approximately 9:00 a.m. on September 22, 1975, to evacuate the platform in question?

   To which the jury answered "yes".

2. In the selecting of the method used to evacuate Steven Gaedecke's crew from the platform?

   To which the jury answered "yes".

If you have answered "yes" to either parts of Special Issue No. 1, and only in that event, then answer

SPECIAL ISSUE NO. 2

Was such a proximate cause of the injuries suffered by Steven Gaedecke?

To which the jury answered "yes".

SPECIAL ISSUE NO. 3

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Steven Gaedecke as a direct and natural result of the injuries he received in the incident in question.

You will consider the following elements of damage, if any, and none other:

(a) Loss of earnings which he has sustained in the past;

(b) Loss of earning capacity which in reasonable probability he will sustain in the future;

(c) Physical pain and mental anguish which he has suffered in the past;

(d) Physical pain and mental anguish which in reasonable probability he will suffer in the future;

(e) Physical impairment he has sustained in the past;

(f) Physical impairment which in reasonable probability he will sustain in the future.

Answer in dollars and cents, if any.

To which the jury answered "$900,000.00".

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Steven Gaedecke's injuries were incident to, or resulted directly or indirectly from the work to be performed by Gulf Offshore Company under its contract with Mobil?

To which the jury answered "yes".

Catherine Mary Byrnes

Verdict of the jury was received by the Court and filed and entered of record on the minutes of the Court, and the Court having considered the pleadings on file herein, the verdict of the jury, the stipulations of the parties and the proof adduced, and having considered Plaintiff's Motion for Judgment, the Court is of the opinion that Plaintiff is entitled to have and recover of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of entry of the Judgment until paid;

The Court is further of the opinion that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company should have and recover the sum of $32,712.09;

The Court is further of the opinion that Plaintiff should have and take nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

The Court is further of the opinion that Third-Party Plaintiff Mobil Oil Corporation is entitled to and is granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay to Plaintiff by the terms of this Judgment;

The Court having further heard arguments and having read the briefs is of the opinion that the Law of Louisiana does apply and hereby applies such law in this action;

It is therefore,

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Steven Gaedecke do have and recover

of and from the Defendant Mobil Oil Corporation the sum of $900,000.00, together with interest thereon at the rate of 9% per annum from the date of the entry of Judgment until paid;

ORDERED, ADJUDGED and DECREED by the Court that out of such amount recovered by the Plaintiff against Defendant Mobil Oil Corporation, the Intervenor Employers' National Insurance Company do have and recover the sum of $32,712.09;

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff has and takes nothing of and from the Defendants, Arthur Levy Boat Company, Arthur Levy, Inc. and Offshore Crews, Inc.;

ORDERED, ADJUDGED and DECREED by the Court that Third-Party Plaintiff Mobil Oil Corporation is hereby granted indemnity of and from Third-Party Defendant Gulf Offshore Co., A Division of the Pool Company for all sums, including interest and costs of court, that the Defendant Mobil Oil Corporation is required to pay by the terms of this Judgment;

ORDERED, ADJUDGED and DECREED that all costs of court accrued herein be and are taxed against the Defendant Mobil Oil Corporation for which execution may issue with same if not timely paid.

All relief not granted herein is denied.

SIGNED, RENDERED and ENTERED this 18th day of December, 1978.

/s/ THOMAS J. STOVALL, JR.
Judge Presiding

APPROVED AS TO FORM ONLY:

JAMAIL AND KOLIUS

_____

Attorneys for Plaintiff

FULBRIGHT AND JAWORSKI

_____

Attorneys for Intervenor,
Employers' National Insurance Company

CRAIN, CATON, JAMES & OBERWETTER

_____

Attorneys for Defendant-Third-Party
Plaintiff, Mobil Oil Corporation

ROYSTON, RAYZOR, VICKERY & WILLIAMS

_____

Attorneys for Third-Party Defendant,
Gulf Offshore Company, a Division of
the Pool Company

BAKER AND BOTTS

_____

Attorneys for Defendants, Arthur
Levy Boat Company, Arthur Levy, Inc.
and Offshore Crews, Inc.

APPENDIX B

RAISING THE FEDERAL QUESTIONS PRESENTED

B-1

FIRST AMENDED ANSWER OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY.
Filed: September 8, 1978. RAY HARDY, District Clerk, Harris County, Texas. By M. Stuckey, Deputy.

NO. 1,052,262

STEVEN GAEDECKE

VS.

MOBIL OIL CORPORATION, L. A. LEVY, INC., and ARTHUR LEVY BOAT SERVICE, INC.

VS.

GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

In the District Court of Harris County, Texas
215th Judicial District

FIRST AMENDED ANSWER OF THIRD PARTY DEFENDANT GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

To the Honorable Judge of Said Court:

Now comes GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY, Third Party De-

fendant in the above numbered and styled cause of action, and makes this its First Amended Answer to the Third Party Petition of Mobil Oil Corporation, and would respectfully show as follows:

I.

By way of special exceptions, Third Party Defendant would respectfully show as follows:

(a) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant within the subject matter jurisdiction of this Court because exclusive original jurisdiction of the subject matter of the Third Party Plaintiff's cause of action is vested in the United States District Court by virtue of the provisions of the Outer Continental Shelf Lands Act, 46 U.S.C. § 1331, *et seq.*;

(b) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant and should therefore be dismissed with prejudice;

(c) Third Party Plaintiff's Petition fails to allege a cause of action against Third Party Defendant because Defendant is Plaintiff's employer and the provisions of the Longshoremen's & Harbor Workers' Compensation Act and the Outer Continental Shelf Lands Act prohibit Third Party Plaintiff from seeking indemnity from Third Party Defendant;

(d) Third Party Defendant specially excepts to Paragraph 5 of the Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant "because of the negligence" of Third Party Defend-

ant, said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted negligence, and said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(e) Third Party Defendant specially excepts to Paragraph 5 of Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant because of Third Party Defendant's "breach of its warranty of workmanlike performance", said allegations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted a "breach of its warranty of workmanlike performance", and said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(f) Third Party Defendant specially excepts to Paragraph 5 of Third Party Plaintiff's Petition in which it is alleged that Third Party Plaintiff is entitled to indemnity from Third Party Defendant because of Third Party Defendant's "breach of the terms of the aforementioned Drilling Contract", said allegeations being vague, general and indefinite, it not being alleged in said paragraph or elsewhere in said Petition what acts, omissions, or conduct of Third Party Defendant constituted a "breach of the terms of the aforementioned Drilling Contract, and

said allegations are, therefore, conclusions of the pleader, and Third Party Defendant is unable to determine the issues it must meet upon trial hereof;

(g) Third Party Defendant specially excepts to Third Party Plaintiff's allegations that it is entitled to indemnity because of Third Party Defendant's "breach of the terms of the aforementioned contract" said allegations being untrue on their face in that Plaintiff has alleged that he was injured while onboard a vessel owned by another Defendant and not "while engaged in operations pursuant to a Drilling Contract entered into between Third Party Plaintiff Mobil Oil Corporation and Third Party Defendant Gulf Offshore Company, A Division of the Pool Company."

Of which special exceptions, each being taken separately and apart from each other, Third Party Defendant prays judgment of the Court together with costs.

II.

Without waiving the foregoing special exceptions, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant denies each and every, all and singular, the allegations contained within the Third Party Petition and demands strict proof thereof.

III.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that if Plaintiff were injured as

alleged, such injuries would be due solely to the Plaintiff's own negligent acts and omissions or were directly and proximately contributed to by Plaintiff's negligence, or, alternatively, were due to an unavoidable accident.

IV.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that if Plaintiff were injured as alleged, such injuries were caused in whole or in part by the negligent acts and omissions of a third party or were directly and proximately contributed to by the acts and/or omissions of a third person for whom Third Party Defendant is not responsible.

V.

Without waiving the foregoing special exceptions and defenses, but still insisting upon the same, for further answer herein, if any be necessary, Third Party Defendant would respectfully show that it was the employer of Plaintiff and under the Outer Continental Shelf Lands Act and Longshoremen's & Harbor Workers' Compensation Act, Third Party Plaintiff is not entitled to seek indemnity from Plaintiff's employer.

WHEREFORE, PREMISES CONSIDERED, Third Party Defendant prays that upon trial hereof, Third Party Plaintiff take nothing and that Third Party Defendant go hence without day, with its costs and such other and further relief as it may be entitled to receive.

ROYSTON, RAYZOR, VICKERY & WILLIAMS

By /s/ CHARLES D. KENNEDY
Charles D. Kennedy
Suite 3710
One Shell Plaza
Houston, Texas 77002
713/224-8380
Attorneys for Third Party Defendant

CERTIFICATE OF SERVICE

I certify that a true and copy of the First Amended Answer of Third Party Defendant has been mailed to attorneys for Third Party Plaintiff, Frank Caton, 3300 Two Houston Center, Houston, Texas 77002, and to Plaintiff's attorney, Gus Kolius, 3300 One Allen Center, Houston, Texas 77002, and to attorneys for Levy Boat Service, Inc., Joseph D. Cheavens, Baker & Botts, One Shell Plaza, Houston, Texas 77002, on this 8th day of September, 1978.

/s/ W. C. QUILLIN
Of Royston, Rayzor, Vickery & Williams

B-7

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTION C

Filed: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By R. Trinkle, Deputy.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.